

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

- v -

MICHAEL SCOTT APGAR,

Defendant-Appellee.

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Sup. Ct. No. 127651

COA No. 247544

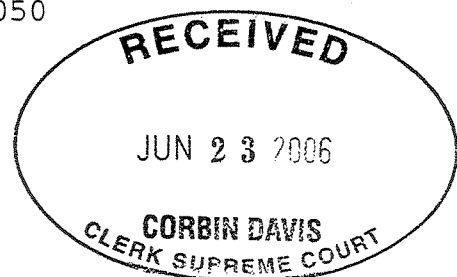
Lower Court No. 02-012129

**BRIEF OF DEFENDANT-APPELLEE**

**NO ORAL ARGUMENT REQUESTED**

**CERTIFICATE OF SERVICE**

LAW OFFICES OF SUZANNA KOSTOVSKI  
SUZANNA KOSTOVSKI (P 39535)  
Attorney for Defendant-Appellee  
Suite 1512  
1249 Washington Blvd.  
Detroit, MI 48226  
(313) 965-6050



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## STATEMENT OF APPELLATE JURISDICTION

The jurisdiction of the Supreme Court in this matter is based on MCR 7.300. The Judgment of Sentence in the trial court was entered on or about February 7, 2003. A timely Claim of Appeal was filed by the Wayne County Circuit Court Clerk's Office following Defendant-Appellant's request for appointment of counsel and a declaration of indigency. Counsel was appointed on or about March 12, 2003. The Court of Appeals issued its decision on November 9, 2004 and People filed a timely Application For Leave To Appeal with this Court.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE PROSECUTION IS AN "AGGRIEVED PARTY" WITHIN THE MEANING OF MCR 7.203(A)?

II.

DID THE TRIAL COURT ERR BY PERMITTING THE PEOPLE TO AMEND THE INFORMATION AND INSTRUCT THE JURY ON CSC III OVER DEFENSE OBJECTION AND ADEQUATE NOTICE?

## STATEMENT OF FACTS

### I. INTRODUCTION AND BACKGROUND

Defendant-Appellant Michael Scott Apgar ("Defendant" or "Apgar"), was charged in a multi-count Information with: criminal sexual conduct("CSC I"), first degree (weapon used), contrary to MCL 750.520b(1)(e); MSA 28.788(2)(1)(e); and CSC I (accomplices), contrary to MCL 750.520b(1)(d); MSA 28.788(2)(1)(d). The incident which gave rise to these charges stems from the alleged sexual assault of 13-year old Erin Willett. The People claimed that Willett was taken from her friend Amber Zaveta's home on the evening of August 27, 2002 by the Defendant and two other individuals: co-defendant Anthony Algahmee and Rashad James Ali. Willett was apparently taken to a home in Hamtramck, Michigan where she engaged in sexual intercourse with the Defendant and performed fellatio on Algahmee and Ali. Following a four-day jury trial, Defendant was convicted of criminal sexual conduct in the third degree. On February 7, 2003, the trial court exceeded the sentencing guidelines and sentenced Defendant to 50 months to 15 years incarceration.

## **II. TRIAL TESTIMONY**

### **A. AMBER ZAVETA**

Amber testified that she is 13 years old and a friend of Willett. On August 27, 2002, Willett came over to Amber's house supposedly to sleep over. Willett told Amber that she was going to apparently tell her grandmother (with whom she had been residing), that she was going to sleep over at Amber's house. However, Willett said this was lie and her real reason for coming over was so that she could go out with Defendant, Algahmee and Ali.

### **B. ERIN WILLETT**

Willett testified that on the night in question, she told her grandmother that she was going to spend the night at Amber's house. While at Amber's house, she was asked by the three defendants if she wanted to go to the store with them. She got in the back seat with Apgar. Ali was driving and Algahmee was in the front passenger seat. She further testified that the men rolled up the windows and locked the door. She claimed that Apgar put what appeared to be a knife to her throat and allegedly forced her to smoke marijuana while they drove around. A couple of hours later, they arrived at a home. She was allegedly taken to the back room by Apgar and she claimed that he forced her at knife point to engage in sexual intercourse. Thereafter, Algahmee and Ali came into the room one by one and they also forced her at knife point to

allowed the victim to be penetrated by two others. Trial counsel objected to the scoring of the guidelines as well as the court's departure therefrom (Sent, 6-10, Appendix 33A-43A).

#### **IV. DIRECT APPEAL**

Defendant filed a direct appeal to the Michigan Court of Appeals. In a 2-1 decision, the Court of Appeals affirmed the Defendant's conviction and sentence. Judge Murphy dissented in part on the basis that it was error for the trial court to instruct the jury on CSC III because Defendant did not receive sufficient notice and all of the elements of the crime were not proven beyond a reasonable doubt. Judge Murphy further found that reversal was warranted in light of this Court's holding in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). Subsequently, the People filed an application for leave to appeal with this Court, seeking an interpretation as to whether the *Cornell* test applies to offenses that the Legislature has formally divided into degrees.

## ARGUMENT

### I.

#### THE PEOPLE ARE NOT AN "AGGRIEVED PARTY" WITHIN THE MEANING OF MCR 7.203(A)

It is undisputed that the People were the prevailing party before the Court of Appeals since Defendant's conviction and sentence were affirmed. As such, the People have no standing to bring this matter before the Court since they do not fall within the definition of "aggrieved party" of MCR 7.203(A). The People claim that MCR 7.203(A) does not apply in this case because this Rule concerns itself with the authority and jurisdiction of the Court of Appeals. The People are not correct in their analysis. While its true that MCR 7.300 governs this Court's practice and procedure regarding appeals, various subsections of MCR 7.300 also refer to the rules contained in subchapter MCR 7.200.<sup>2</sup>

As this Court knows, judicial powers normally only extend over actual cases and controversies. *Roe v Wade*, 410 US 113, 123-125, 128-129; 93 S Ct 711; 35 L Ed 2d 147 (1973). Courts generally have no authority to give opinions upon moot questions. *Church of Scientology of California v United States*, 506 US 9, 12; 113 S Ct 447; 121 L Ed 2d 313 (1992); *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001); *People v Rutherford*, 208 Mich App 198, 204;

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<sup>2</sup> For example, the briefs before this Court must conform to the court rule governing briefs in the Court of Appeals. See MCR 7.306. Also, the application must conform with MCR 7.212(B).

526 NW2d 620 (1995). As the Court stated in *Church of Scientology, supra*, at 506 US 12, "for that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effective relief whatever to a prevailing party, the appeal must be dismissed. An actual controversy must exist at each stage of review. *Roe, supra* at 410 US 125.

For the foregoing reasons, this Court should dismiss the People's appeal.

## II.

### THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON CSC III OVER DEFENSE OBJECTION AND ADEQUATE NOTICE

#### A. STANDARD OF REVIEW

A trial court may allow the amendment of an information at any time. Such a decision will not be overturned on appeal in the absence of a showing of prejudice to the defendant or that a failure of justice resulted. *People v Mahons*, 97 Mich App 192; 293 NW2d 618 (1980).

#### B. THE AMENDMENT OF THE INFORMATION AT CLOSE OF TRIAL WAS ERROR

During the discussion about jury instructions, the People requested the court to instruct on CSC III. Defendant was never charged with this offense in the first instance. Instead, the People only charged Defendant with CSC I (weapon). Defense counsel

vehemently objected to this instruction on the basis that it constituted an amendment of the information as well as timeliness and surprise. The trial court allowed the amendment stating that CSC III was merely a lesser included offense of CSC I.

MCL 767.76; MSA 28.1016 allows for amendment of the information. The Court in *People v Erskin*, 92 Mich App 630, 637-638; 285 NW2d 396 (1979), interpreted the statute:

[T]he \* \* \* statute does not authorize the court to allow the changing of the offense or the addition of a new charge by way of amendment; rather, it only permits the procedural cure of defects in the statement of the offense which is already sufficiently charged to fairly apprise the defendant and the court of its nature. (Citations omitted)

Where an amended information does not introduce a new and different offense, but simply constitutes an amendment as to form, remand for rearraignment or a new preliminary examination is unnecessary. *People v Iaconis*, 29 Mich App 443, 463; 185 NW2d 609 (1971), *aff'd sub nom People v Bercheny*, 387 Mich 431; 196 NW2d 767 (1972). To hold otherwise would run afoul of MCL 767.42(1); MSA 28.982(1).<sup>3</sup>

A trial court has no authority to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice. *People v Adams*, 389 Mich 222; 205 NW2d 415

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<sup>3</sup> This statute requires that a preliminary examination take place first before an information may be filed, unless the individual waives the exam.

(1973); *DeJonge v Oregon*, 299 US 353; 57 S Ct 255; 81 L Ed 278 (1937). The notice is adequate if the latter charge is a lesser included offense of the original charge. *People v Ora Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975). Recently, in *People v Cornell*, *supra* at 357, this Court held that a necessarily included lesser offense instruction is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.

MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offense. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *Cornell*, *supra* at 357. Even with a necessarily included lesser offense, an instruction cannot be given unless a rational view of the evidence would support the instruction. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

MCL 768.32(1) provides in pertinent part:

[U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

As Judge Murphy noted in his dissenting opinion, for purposes of this case, the jury could have found Defendant guilty of CSC I

or necessarily included offenses of CSC I, but the jury was not permitted to find Defendant guilty of the cognate lesser offense of CSC III. Without a CSC III instruction, which was precluded in this case because of a lack of notice, there would have been no conviction.

As for the People's contention that *Cornell* is inapplicable since the Legislature chose to delineate CSC into varying degrees, that argument ignores the very holding in *Cornell*. In *Cornell*, this Court stated that before a trial court may instruct only on those offenses deemed to be "inferior" to the charged offense. In this case, the offense of CSC III does not qualify as an "inferior" offense because it does not conform with the federal understanding of what constitutes a "lesser included offense." See *Cornell*, *supra* at 356 n 9.


In this case, the trial court erred by allowing the amendment and issuing the instruction. The inclusion of CSC III introduced a new and different offense. This was not merely an amendment to correct some misnomer on the information. This amendment introduced a new substantive offense and gave the jury another basis upon which to convict. Defendant's conviction should be reversed a new trial ordered.

**CONCLUSION AND RELIEF REQUESTED**

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals and declare that Defendant was denied due process under both the state and federal constitutions when the trial court instructed the jury on CSC III without adequate notice to the defense and over defense objections.

Respectfully submitted,

LAW OFFICES OF SUZANNA KOSTOVSKI

By   
SUZANNA KOSTOVSKI (P 39535)  
Attorney for Appellee  
Suite 1512  
1249 Washington Boulevard  
Detroit, MI 48226  
313-965-6050

Date: June 21, 2006

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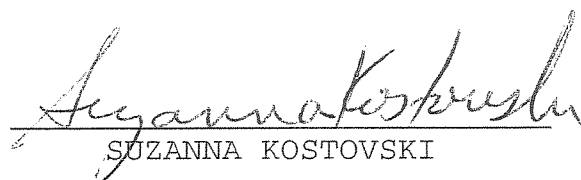
Lower Court No. 02-012129

**CERTIFICATE OF SERVICE**

SUZANNA KOSTOVSKI, says that on the 21st day of June, 2006,  
she served a copy of Brief of Defendant-Appellee upon:

Timothy Baughman, Esq.  
Chief of Research  
12th Floor  
1441 St. Antoine  
Detroit, MI 48226

via U.S. mail.

  
SUZANNA KOSTOVSKI

Date: June 21, 2006